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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954
No. 553

PEARL ARCHER and JOSEPH ARCHER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Pearl Archer and Joseph Archer, pray that a writ of certiorari issue to review the final judgment of the Circuit Court of Appeals for the Ninth Circuit affirming the decision and judgment of the United States District Court of Southern California, Central Division, which District Court had ordered and entered Summary Judgment in favor of the respondent, United States of America, dismissing said action.

Opinions Below.

The opinion of the Court of Appeals for the Ninth Circuit [R. 73-79] is not yet reported. Copies of the Court's opinion and judgment are appended.

The opinion of the United States District Court for the Southern District of California, Central Division is reported as 112 Fed. Supp. 651. Copy of the Court's opinion and judgment are appended.

Date of Judgment and Time of Entry.

The judgment of the Court of Appeals is dated and entered October 22, 1954.

Concise Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked.

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

Questions Presented.

1. Did the Court of Appeals commit fundamental error in ruling to the effect that the Complaint in this cause did not state a cause of action or a claim upon which relief could be granted against the United States of America under the Federal Tort Claims Act, after determining that the summary judgment entered by the District Court was technically improper.

2. Did the Court of Appeals commit fundamental error in ruling to the effect that that decedent son of petitioners under the undisputed, material facts, was "in line of duty" at the time of his death.

3. Did the Court of Appeals commit fundamental error in ruling that said decedent son of petitioners, a cadet in the West Point Military Academy, while on undisputed "leave" or "furlough" from the Academy, being transported in a United States Army Plane which was then being operated by an employee of the United States Army, would not have a valid claim against the

government under the Federal Tort Claims Act, for an accident causing him damage, and that thereby no one has such claim for his death.

4. Did the Court of Appeals commit fundamental error in ruling that said decedent son of petitioners under these circumstances in riding aboard that plane, under these allegations, was either "in command" or "under command."

5. Did the Court of Appeals commit fundamental error by refusing to reverse the summary judgment of the United States District Court, and to remand the cause to said District Court for further proceedings after determining that the granting of the summary judgment was technically improper.

6. Did the Court of Appeals commit fundamental error in ruling that the Complaint of the petitioners on its face did not state a cause of action and that under the circumstances and undisputed facts, no claim could ever be stated.

The Statutes Which the Case Involves.

This case involves the Federal Tort Claims Act (28 U. S. C. 2674, *et seq.*), the material portions of which are as follows:

The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . . Certain exceptions are contained therein which are immaterial herein.

A Concise Statement of the Case.

The petition seeks review of a judgment of the Court of Appeals for the Ninth Circuit refusing to reverse and to set aside the summary judgment of the United States

District Court of California, Southern District, Central Division.

Petitioners are the surviving parents of Herman Archer, deceased. The decedent at the time of his death, was a cadet at the United States West Point Academy, West Point, New York. At the time of his death, he was returning to the Academy from a Holiday visit with his parents who reside at Los Angeles, California, in a plane owned by the United States and operated by a member of the United States Army. Decedent was lawfully and permissibly absent from the Academy at the time of death, being still on Christmas leave of absence, when the plane crashed near Phoenix, Arizona.

Prior to his death, decedent, Herman Archer, was in school attendance at the Academy. In the school's term there is a period around each Christmas and New Year when required attendance at the Academy is suspended and the cadets are permitted to, and many of them use, this "breather" to make trips, especially to their own homes.

These trips are made pursuant to specific orders of the Academy granting permission for such leave. Herman Archer concededly, had such leave orders by which permission had been granted to him for "Christmas leave" covering the period during which his death occurred, which leave orders further conditioned that no cadet may leave until he had obtained an approved "leave certificate" from the Commandant of Cadets. [R. 52.] Such leave orders and certificate further permitted cadets to travel via military aircraft at no expense to the government in the sole discretion, decision and determination of the individual cadet. However, the leave orders and certificate did not require any definite method of travel.

The decision to make this trip in this particular government plane was solely that of decedent. It was a changed, subsequent decision of decedent of a prior one for travel by train upon his acceptance of a specific invitation from a brother cadet and the father of this cadet, a colonel in the Air Corp. Such travel was solely upon this invitation as such guest and not under specific orders of travel or assignment or command but in this personal decision, discretion and determination of the decedent to accept the invitation for decedent could have traveled lawfully and permissibly by any means of transportation during such period of leave or absence. He was aboard this plane as such guest and decedent met his death while in this government owned and operated plane, while on leave as such passenger guest.

The circumstances of such death in such plane so owned and operated is not in dispute nor are any of the material facts and circumstances stated herein preceding such decision of decedent, his leave, leave orders, certificate of leave, travel and death. All are conceded and not in dispute and are substantiated by the many exhibits of both petitioners and respondent in the Record. [R. 52; 45.] The application of the rules of law respecting the then legal status of the decedent, prior to and at the time of his death with respect to the United States, is the main dispute for consideration herein.

Basis for Federal Jurisdiction in the Court of First Instance.

The basis for federal jurisdiction in the court of first instance (United States District Court of Southern California, Central Division) is believed sustained by Title 28, United States Code, Section 1346(b), *et seq.*, commonly referred to as the "Federal Tort Claims Act."

ARGUMENT.

This cause involves questions and we believe the decision below is in conflict with applicable decisions of this Court and that of other Courts of Appeal.

The United States Supreme Court first considered a similar factual situation involving a serviceman in *Brooks v. United States,* 337 U. S. 49, 69 S. Ct. 918. This was an action brought by two servicemen on furlough who, while riding in the family car with their father, were injured by a negligently driven Army Truck. The action was brought under the Federal Tort Claims Act and this Court decided after other confactors, in considering the relationship of the servicemen, Brooks, to the Army at the time of their injuries, in favor of the servicemen, holding that a cause of action could lie against the government and that primarily the claims of servicemen for the negligence of the government fell generally into two basic categories; the one, where the claimant serviceman was *on leave or furlough* and his injuries were not incident to the service; the other, where the claimant was on active duty or under orders and the injuries were incident to the service. In the *Brooks* case, this Court decided the first situation and reserved for decision the second situation.

In holding that Brooks could recover under the Federal Tort Claims Act, they being on leave or furlough at the time of their injuries, the Court reasoned, at page 52:

> "But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks service, a wholly different case would be presented."

This case held that there is included a cause of action under the Federal Tort Claims Act in favor of one who is a member of the armed services against the United States, providing that his injuries are not incident to his service, and that when circumstances indicate that when a serviceman is on leave or furlough while sustaining such injuries, that such injuries are not incident to his service.

However, the *Brooks* case did leave open and reserved for later decision, and undecided, the consideration and determination as to what result would be reached if the accident resulting in the injuries were incident to such service, and in three cases thereafter appealed to the Supreme Court, and consolidated, being *Feres v. United States,* 340 U. S. 135, 71 S. Ct. 153, this Court, after reviewing the factual circumstances of these three cases, stated, at page 138:

> "The common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injuries due to the negligence of others in the armed forces. The only issue of law raised is whether the Tort Claims Act extends its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong. This is the 'wholly different case' reversed from our decision in Brooks v. United States, 337 U. S. 49, 52."

This Court then distinguished the factual situations between the *Brooks* case and the *Feres* case, and stated at page 146:

> ". . . The actual holding in the Brooks' case can support liability here only by ignoring the vital distinction there stated. The injury to Brooks did

not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission. . . ."

This court thereafter recently considered another case involving the application of the *Brooks* and *Feres* cases, being *United States of America v. Brown,* as yet unreported, decided December 6, 1954. In this case certiorari was granted because of doubts as to whether the *Brooks* or *Feres* decision controlled that case.

The court therein summarized the *Brooks* case stating that it held that servicemen were covered by the Federal Tort Claims Act where the injury was not incident to or caused by their military service. Similarly, this Court summarized the *Feres* case and held that in each of these three cases, the injury for which compensation was sought under the Tort Claims Act, occurred while the serviceman was on active duty and not on furlough. This court therein stated:

> "The Feres decision did not disapprove of the Brooks case. It merely distinguished it, holding that the Tort Claims Act does not cover 'injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."

Further, this Court concluded by summarizing:

> "We adhere also to the line drawn in the Feres case between injuries that did and injuries that did not arise out of or in the course of military duty. Since the negligent act giving rise to the injury in the present was not incident to the military service, the Brooks case govern . . ."

We believe that the instant case comes within the *Brooks* case. All of the facts and circumstances are undisputed

to the effect that decedent was on leave or furlough—was not under orders requiring his travel on this government plane nor on any other government vehicle or plane—that such travel was or any particular manner of transportation upon or express invitation and as a guest of a brother cadet and his father, solely in the determination, discretion, decision and voluntary choice of decedent alone to so travel, for as stated, he could have chosen any method of transportation he himself elected. His leave orders and leave certificate permitted such travel—did not require it. In summary, when the Christmas leave of decedent commenced and until the time required and ordered for his return, he was on his own—on leave or furlough.

If any factual distinction may be drawn between the instant case and that of the *Brooks* case, it is in the sole single circumstance—decedent was a guest occupant of the negligently operated vehicle which caused his death, while in the *Brooks* case the servicemen in another vehicle which was struck by a negligently owned ond operated government vehicle.

If the test laid down by this Court in the *Brooks* case and restated in the *Brown* case, *supra,* is whether or not the injuries did or did not arise out of or in the course of military duty, and since—were or were not incident to the service, decedent too was on leave or furlough, the negligent acts herein likewise must give rise to a cause of action as his death was occasioned by an accident not incident to his military service.

Of cause, decedent was subject to certain military discipline while on this plane, because of and solely by virtue of and to the extent that any serviceman not yet discharged would be under every circumstance, as were the Brooks.

But as this Court pointed out in the *Brooks* case, we are dealing with an accident which had nothing to do with his army career—injuries not caused by his service, except in the sense that all human events depend upon what has already transpired.

Hence, the finding and decision of the lower court and the Court of Appeals that decedent at the time of his death was either "in line of duty," "in command" or "under command," we believe, is contrary to the facts and undisputed circumstances of death and is in conflict with and contrary to the applicable law in the decisions of this Court in these cited cases.

A cause of action could and did lie in favor of these petitioners under the Tort Claims Act against the government and hence the determination and decision of the Court of Appeals deciding that the Complaint on its face did not state a cause of action on its face or a claim upon which relief could be granted against the United States, and that the proceedings show that no claim within the statute could be proved is not correct and in error.

The Complaint alleges sufficient facts therefor to state a cause of action in view of the Tort Claims Act provisions and under the application of the law of the *Brooks* and *Brown* cases, and while such Complaint might be in later consideration by the court of first instance, to motions, petitioners should not be deprived of their right to be heard thereon and to replead if so required by reason of the fact that there can be stated a cause of action.

The Court of Appeals having correctly disposed of and determined that the granting of the motion for Summary Judgment and such judgment was technically improper, should then have remanded the cause by reversal of that

decision to the lower court for further proceedings in view of the law of the *Brooks* case. While the decision in the *Brown* case is subsequent to the decision by the Court of Appeals in this case, it does substantiate our position as it reaffirms the *Brooks* case—it clarifies the determining factors for deciding such liability under the Tort Claims Act.

We respectfully submit that the finding of the lower court to the effect that petitioners were further barred from recovery under the Tort Claims Act because they were allowed compensation under the Veterans Laws for the death of their son, being an exclusive remedy which forbids their suing under the Federal Tort Claims Act is not discussed herein for the reason that the Court of Appeals in its decision held otherwise as did this court subsequently in as a further consideration in the *Brown* case, ***supra.***

In view of the foregoing, we respectfully submit that the opinion of the Honorable Court of Appeals clearly indicates that the Court of Appeals failed to follow through and apply the rulings of the *Brooks* case. We respectfully submit that the rulings of the *Brown* case further substantiate this contention of the petitioners.

Conclusion.

Wherefore, petitioners respectfully submit that this petition presents very important and grave questions as stated in the forepart of this petition. Petitioners therefore pray for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit. A decision by this Court will resolve several conflicts of decisions between Court of Appeals and many District Courts gov-

erning the application of the tests, laws and decisions of the *Brooks', Feres'* and *Brown* cases, and especially in view of the fact that the *Brown* case was subsequently decided.

We respectfully submit that the petition for certiorari should be granted.

HENRY J. FOX,
Counsel for Petitioners.

NORMAN B. SILVER,
HAROLD I. CHERNESS,
EDWARD FELDMAN,
Of Counsel.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Pearl Archer and Joseph Archer, Appellants, vs. United States of America, Appellee.

No. 13,930. Oct. 22, 1954.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Fee and Chambers, Circuit Judges, and Clark, District Judge.

James Alger Fee, Circuit Judge:

Plaintiffs, who are the parents and heirs of Herman Archer, bring this action for his death. They allege:

"That on or about the 30th day of December, 1951, the deceased, Herman Archer, a cadet at West Point Military Academy, boarded a United States Army Plane at San Francisco, California, for the purpose of being transported to New York.

"That said plane was being operated by Doe One, an employee of the United States Army and at all times herein mentioned Doe One was the servant, agent and employee of the defendant United States of America, employed by the United States Army, and was operating said United States Army Plane herein described with the consent and permission of the defendant United States of America, and within the course and scope of his employment, agency and authority; that he did so carelessly, recklessly, negligently and unlawfully operate, maintain, manage and control said airplane as to cause said airplane to fall, causing the death of all the passengers and operators on said plane, including plaintiffs' son, Herman Archer." It is further set up that, as a proximate result of the alleged negligence, Herman Archer died, to their damage.

The United States filed an answer which consisted of a general denial and several affirmative defenses.[1]

Thereafter, a motion for summary judgment was filed. A great many affidavits were received on the question of whether the fact that the cadet was riding an army plane in order to get back to his post before his leave expired had an effect on the right of the parents to recover. The Court made findings of fact as to two specific issues, and thereupon entered summary judgment. This was technically improper. If any one thing were shown more clearly than another, it was that the cause presented many genuine issues of material fact.[2] The Court decided certain of these issues of fact upon affidavits and documents submitted by the parties and entered judgment. The function of the Court on motion for summary judgment is not to try any issue of material fact upon deposition or affidavit.[3] Rule

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[1]Crowell v. Baker Oil Tools, Inc., 9 Cir., 143 F. 2d 1003, 1006, by Mathews, C.J.: "The answer admitted some of the allegations of the complaint, denied others and contained allegations which were deemed denied. Some, at least, of the issues thus raised were genuine issues as to material facts. Thus instead of showing that there was no issue as to any material fact the pleadings showed that there were such issues."

[2]Summary judgment may be entered if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure.

[3]Summary judgment was reversed where, although the complaint was held to have stated a cause of action, the affidavits in support of the motion "upon their broadest application do no more than to present to the trier of fact evidence upon material issues. They do not absolve the issues as matters of law." Lane Bryant, Inc. v. Maternity Lane, Limited, of California, 9 Cir., 173 F. 2d 559, 565; Hoffman v. Babbitt Bros. Trading Co., 9 Cir., 203 F. 2d 636. "* * * although an affidavit filed in support of a motion for summary judgment may be considered for the purpose of ascertaining whether an issue of fact is presented, it cannot be used as a basis for deciding the fact issue." F.A.R. Liquidating Corporation v. Brownell, 3 Cir., 209 F. 2d 379.

43 provides: "In all trials the testimony of witnesses shall be taken orally in open court * * *."

The Trial Court thus established two propositions. The first was that at the time of accident Herman Archer was on leave from the United States Military Academy, West Point, New York, where he was a cadet, and that he was riding gratuitously in a military plane under military discipline and under the laws and regulations in force at the time. The second was that the parents applied for and received compensation based upon death in army service.

Although these two issues of fact were decided upon documents and affidavits, no appeal was taken from the findings, and it is now conceded that only points of law are here raised.[4] Based upon this and the agreement that no questions of fact were presented upon the two situations, the findings of the Trial Court are accepted, and the technical point that there was actually a trial of genuine issues of material fact is thereby cured.

But the trial judge, in the presence of other material issues of fact, decided the case and entered summary judgment. The rule provides that in this situation the Court "shall thereupon make an order specifying the facts that appear without substantial controversy" and proceed to dispose of the other material issues.[5] Appellants raise the

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[4]Appellant conceded that the suggestion in one of the points on appeal that Herman Archer was "in line of duty" at the time of the accident presented a matter of law to be determined upon the agreed facts and documents.

[5]Rule 56(d) provides a method of entering summary judgment upon one or more issues of fact found not to be genuine or material. If this had been done, and a pre-trial conference had been held on the other issues, there is little doubt that admissions could have been obtained upon which the whole case might have been resolved. Such admissions should be of record by stipulations made in open court, or incorporated into the record in writing.

point that the summary judgment was improperly entered here. It must be conceded that both the rule and proper practice dictate that all genuine issues be ruled upon. Otherwise, if the trial judge were to dispose of the case upon issues which seemed vital, multitudinous split appeals might harass the appellate courts[6] and the case go off on close questions of statutory or constitutional construction which might never otherwise have been reached.[7] Short cuts are fraught with danger. This case is illustrative.

Under the system established by the Civil Rules, the Trial Court should have then held a pre-trial conference after it had been determined that these two findings of fact had not disposed of such issues. It should have then been determined what were the remaining issues for trial, if any. However, the procedures established are not rigidly binding, if no injustice were done.

The Trial Court was undoubtedly correct in holding that a cadet riding under military discipline on an army plane under control of a superior officer has no claim under the Act for injury sustained through whatever cause. This principle would not vary even though the service man were on leave and whether he were on the plane voluntarily or by command. He was in line of duty. Under such circumstances, his parents could not recover for his death.

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[6]Remand and further appeals may be necessary when the trial and appellate courts disagree on the effect of a single established fact considered decisive by the trial court. "The district courts would do well to note that time has often been lost by reversal of summary judgments improperly entered." Doehler Metal Furniture Co., Inc. v. United States, 2 Cir., 149 F. 2d 130, 135.

[7]For a discussion of policy, see Waialua Agricultural Company, Ltd. v. Maneja, 9 Cir., 178 F. 2d 603 and ..... F. 2d ..... (second appeal).

On the other hand, one of the stated defenses in the answer seems to set up an inconsistent situation. Since all matters set up in the answer are deemed denied, this is a contested material issue. Furthermore, the existence of a coordinated and liberal amount for compensation for service men and for dependent parents of service men is used as one of the factors in construing the debatable ground between the Tort Claims Act and the service compensation acts. It is by no means established that the claim or acceptance of benefits under the statutes for service men and their dependants tends to establish a waiver or estoppel against pursuing a remedy under the Tort Claims Act, if one existed. Besides, there were allegations in this case which might create fact questions as to whether these doctrines were applicable to these plaintiffs.

Therefore, since there were these material questions unresolved which were raised by the affirmative allegations of the answer, a summary judgment could not properly be entered. However, if the Appellate Court can sustain the dismissal of the complaint and claim upon any ground and thereby save remand on a technical procedural basis, it should be done. Undoubtedly, under the situation disclosed by the record, plaintiffs have no right against the United States.

But here the complaint did not state a cause of action or a claim upon which relief could be granted. The allegations set out would indicate the usual transportation of a soldier in military service in line of duty. As has been seen, the Tort Claims Act does not cover such a situation. The general rule is that there can be no recovery under this statute in such a state of fact. Since the affidavits and documents have been presented, it clearly appears that plaintiffs could not have stated a case within the exceptions.

Furthermore, it is obvious enough from the pleading, since there were no specifications of negligence and no identification of negligence on the part of the "employee," that the only circumstance complained of is the fall of the plane and the resultant death of Archer. It is not even alleged that Herman Archer was not himself in control thereof. Is the United States sued as a common carrier? Does the doctrine of *res ipsa loquitur* apply? Is the law of employer, and employee to be applied as if the employee were being carried back gratuitously to the employer's place of business to resume work? Has the state any law which applied to a soldier against the United States? Even if the soldier should be assumed to be in the position of an employee of the United States (and there is no law to that effect), has the state any doctrine of law under which a cause of action might be stated?

"No federal law recognizes a recovery such as claimants seek."[8] For "the scope, nature, legal incidents and consequences of the relation between persons in service and the government are fundamentally derived from federal sources and governed by federal authority."[9] None of the supposed analogies hinted above apply. None of the several states have law, statutory or decisional, which applies to a situation where a soldier is under military authority. At no locale in the limits of the United States would a "private person" therefore "be liable to the claimant in accordance with the law of the place."[10]

The locality of the action claimed to have caused damage is an indispensable allegation under the statute. But

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[8]Feres v. United States, 340 U. S. 135, 144.

[9]United States v. Standard Oil Co., 332 U. S. 301, 305-306.

[10]28 U. S. C. A., Section 1346(b).

it was not alleged where the negligence occurred. It is not alleged where the death happened. It was thus not shown by the complaint that the accident occurred "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[11] This provision of the Act seems to be respected more by being disregarded than in any other manner.

There was no action for wrongful death at common law. The legislative enactments of the various states create such a cause of action in amounts variously limited and to various persons or characters such as relatives, executors or administrators, heirs and others.

It is therefore of no importance that, although the complaint does not allege it, the Court found that the plane crashed near Phoenix, Arizona. The flight was alleged to be in a government plane which started from San Francisco with the destination of New York City.

"It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value."[12]

A "cadet" being "transported" in a "United States Army Plane," which was operated by an employee of the United States Army, has no valid claim against the government for an accident causing him damage. Nor has anyone such a claim for his death. In riding aboard that

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[11]28 U. S. C. A., Section 1346(b).

[12]Feres v. United States, 340 U. S. 135, 143.

plane, under these allegations, Herman Archer was either "in command" or "under command."

The complaint in this case on its face did not state a cause of action or a claim upon which relief could be granted against the United States.[13] This is not a technicality since the proceedings show that no claim within the statute could be proved. The point has not been waived.[14]

The action was therefore properly dismissed and the judgment of dismissal is sustained.

Affirmed.

(Endorsed:) Opinion. Filed Oct. 22, 1954. Paul P. O'Brien, Clerk.

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[13]The District Court was affirmed where, although affidavits and exhibits were presented on motion for summary judgment, the court instead granted a motion to dismiss the complaint. Moffett v. Commerce Trust Co., 8 Cir., 187 F. 2d 242, cert. den., 342 U. S. 818.

[14]Under Rule 12(h), the defendant has not waived the defense of failure to state a claim upon which relief can be granted, and the granting as a motion to dismiss may be sustained on that basis.

APPENDIX B.

Archer v. United States. Cite as 112 F. Supp. 651.

Norman Silver, Edward Feldman, Los Angeles, Cal., for plaintiffs.

Walter S. Binns, U. S. Atty., Clyde C. Downing, Max Deutz, Assts. U. S. Attys., Los Angeles, Cal., for defendants.

YANKWICH, Chief Judge.

The motion of the Government for summary judgment, filed on March 20, 1953, heretofore argued and submitted is now decided as follows:

The motion is granted.

Findings and judgment to be prepared by counsel for the Government in accordance with the views here expressed.

Comment.

[1, 2] I am of the view that plaintiffs cannot recover. The decedent, Herman Archer, a cadet at West Point Military Academy, was, at the time of his death, traveling in a military plane, under military discipline, and was, under the laws and regulations in force at the time, on military duty. His death occurred "in the course of military duty." Feres v. United States, 1950, 340 U. S. 135, 146, 71 S. Ct. 153, 95 L. Ed. 152, modifying and distinguishing Brooks v. United States, 1949, 337 U. S. 49, 69 S. Ct. 918, 93 L. Ed. 1200.

Under the law the plaintiffs are allowed compensation for the death of their son. This is an exclusive remedy which forbids their suing under the Federal Tort-Claims Act, 28 U. S. C. A., Section 1346. Feres v. United States,

supra; Johansen v. United States, 1952, 343 U. S. 427, 72 S. Ct. 849, 96 L. Ed. 1051.

Hence the ruling above made.

Findings of Fact.

I.

The plaintiffs, Pearl Archer and Joseph Archer, are the parents of one Herman Archer, deceased.

II.

On or about December 30, 1951, Herman Archer, then eighteen years of age and a cadet at the United States Military Academy, West Point, New York, met his death in an airplane crash near Phoenix, Arizona.

III.

That at said time and place Herman Archer was on leave, pursuant to written orders, from the United States Military Academy, West Point, New York, and was riding gratuitously with a group of other cadets in a United States Air Force C-47 Aircraft.

IV.

That at the time of his death, the decedent, Herman Archer, was traveling in a military plane, under military discipline, and under the laws and regulations in force at the time.

V.

Pearl Archer and Joseph Archer, as the dependent parents of the deceased, Herman Archer, applied to the Veterans Administration of the United States for the benefits provided under the laws of the United States for dependent parents of deceased servicemen of the United States, particularly under the provisions of Veterans' Regulations

1(a), Part II, under the Act of March 20, 1933, 48 Stat. 8, Public Law No. 2, 73rd Congress, as amended, for death compensation, and under Public Law No. 23, 82nd Congress, 65 Stat. 33, for servicemen's indemnity benefits.

VI.

Since December 31, 1951, the plaintiffs, Pearl Archer and Joseph Archer, as dependent parents of Herman Archer, have received the sums of $28 per month each as death compensation under Public Law No. 2, 73rd Congress.

VII.

Since December 30, 1951, the plaintiffs, Pearl Archer and Joseph Archer, have received servicemen's indemnity benefits under Public Law No. 23, 82nd Congress, in the amounts of $46.45 per month each, and will continue to receive such benefits through November 30, 1961.

VIII.

Under the findings of the Veterans Administration, the deceased Herman Archer has been determined to have died "in line of duty" as a member of the military establishment of the of the United States.

From the foregoing findings of fact the court makes the following conclusions of law:

Conclusions of Law.

I.

The plaintiffs, Pearl Archer and Joseph Archer, as dependent parents, of the deceased, Herman Archer, have a full and adequate remedy for recovery of compensation for the death of the said Herman Archer under the provisions of the compensation statutes of the United States

of America applicable in such cases, particularly under the provisions governing the Veterans Administration of the United States as found in Public Law No. 2, 73rd Congress, and Public Law No. 23, 82nd Congress, and such remedy is exclusive.

II.

The remedy of compensation as set forth above being exclusive, there is no jurisdiction in this Court to entertain this action, and the same must be dismissed.

Let judgment be entered accordingly.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 553

PEARL ARCHER AND JOSEPH ARCHER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion, findings of fact and conclusions of law of the United States District Court for the Southern District of California are reprinted as Appendix "B" to the petition and are reported at 112 F. Supp. 651. The opinion of the United States Court of Appeals for the Ninth Circuit is reprinted as Appendix "A" to the petition and is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 22, 1954 (R. 80). The peti-

tion for a writ of certiorari was filed on January 18, 1955. The jurisdiction of the Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether damages may be recovered under the Federal Tort Claims Act for the death of a member of the armed forces killed incident to his service as a result of the alleged negligence of other military personnel in operating a military plane transporting the serviceman from leave back to his post.

STATUTE INVOLVED

Sections 1346 (b) and 2674 of Title 28 U. S. C. 1 [part of the Federal Tort Claims Act][1] provide:

> 1346 (b). Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or

[1] The Act of June 25, 1948, repealed the Federal Tort Claims Act but re-enacted all of its provisions into the codification of Title 28, effective September 1, 1948 (62 Stat. 683, 862). The Tort Claims Act's basic provisions are now contained in 28 U. S. C. 1346 (b) and 2671–2680.

omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2674. The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

STATEMENT

Petitioners' claim for damages under the Federal Tort Claims Act is based on the allegedly wrongful death of their son, Herman. Their complaint asserted that on December 30, 1951, "the deceased, Herman Archer, a cadet at West Point Military Academy, boarded a United States Army Plane at San Francisco"; that the plane was operated by another "employee of the United States Army * * * within the course and scope of his employment"; and that the Army pilot's negligence caused the plane to fall, resulting in the cadet's death (R. 4–5). After answering and denying negligence on the part of the Army pilot, the United States moved for summary judgment (R. 7, 11).

The district court found as a fact that the serviceman's death occurred while he was on leave

"pursuant to written orders from the United States Military Academy" and that he was then "riding gratuitously with a group of other cadets * * * in a military plane, under military discipline, and under the laws and regulations in force at the time" (R. 60). The district court further found that the Veterans' Administration had determined that his death had occurred "in line of duty as a member of the military establishment of the United States" (R. 61). The motion for summary judgment was accordingly granted and the action dismissed (R. 62, 63).

On appeal, the Ninth Circuit pointed out (1) that "the Trial Court was undoubtedly correct in holding that a cadet riding under military discipline on an army plane under control of a superior officer has no claim under the [Federal Tort Claims] Act for injury sustained through whatever cause" and (2) that petitioners' complaint therefore "did not state a cause of action or a claim upon which relief could be granted against the United States" (Pet. App. 4, 8). For that reason, the Court of Appeals affirmed the judgment of dismissal, despite its view that the case was one inappropriate for summary judgment procedure (Pet. App. 4, 8).

ARGUMENT

Petitioners contend, in effect, that recovery may be had against the United States under the Tort Claims Act for the service-incident death or

injury of a member of the armed forces. But this Court has already considered and rejected that precise contention.[2] Since the record in this case plainly establishes that the serviceman's death was incident to his service and both courts below correctly applied the decisions of this Court in denying recovery, there is, we submit, no warrant for further review or reconsideration at this time.

1. It was implied in *Brooks* v. *United States,* 337 U. S. 49, 50, 52, that service-incident injuries resulting, for example, from "an army surgeon's slip of hand" or "a defective jeep," are not actionable under the Federal Tort Claims Act. The next case of *Feres* v. *United States,* 340 U. S. 135, left nothing to implication. The Court squarely held that the claims of military personnel there involved were not within the coverage of the Act because the claims arose as an incident of military service. This holding was reiterated less than two months ago in *United States* v. *Brown,* 348 U. S. 110, 112, 113, where the Court expressly noted its adherence to the line drawn in the *Feres* case as to injuries which "arise out of or are in the course of activity incident to service."

It is true that in both *Brooks* and *Brown,* unlike *Feres,* it was concluded that causes of action

[2] *Feres* v. *United States,* 340 U. S. 135; *United States* v. *Brown,* 348 U. S. 110; and *Brooks* v. *United States,* 337 U. S. 49.

had been stated under the Tort Claims Act. But *Brooks* and *Brown,* as those two opinions carefully demonstrate, involved injuries *not* incident to the claimants' military service. 337 U. S. 49, 52; 348 U. S. 110, 112. In the instant case, the facts leave no room for doubt that the claim, like that in *Feres,* is service-incident in nature and hence barred under the Act. This is clearly borne out by a comparison of the facts in the *Brown* and *Brooks* cases, on one hand, with those in *Feres* and the instant case, on the other.

In *Brown,* a veteran sued the United States for the alleged negligence of another civilian at a Veterans' Administration hospital. Brown's injury occurred, the Court noted, not while "he was subject to military discipline" but "after his discharge, while he enjoyed a civilian status." 348 U. S. 110, 112. Similarly in *Brooks,* the plaintiff soldiers were riding in their privately owned automobile on a public highway when they were struck by a government vehicle driven by a civilian employee. They were not then on any business even remotely connected with their military service; nor were they on the highway, where they were hit, because of their being soldiers. 337 U. S. 49, 52.

The claims in *Feres* and in the instant case, on the other hand, show that they arose not only incident to military service but as a direct result thereof. *Feres* actually involved three separate cases, those of *Feres, Griggs,* and *Jefferson,* 340

U. S. 135, footnote. Feres, after completing his military duty for the day, burned to death while sleeping in his barracks. Negligence was asserted on the part of other military personnel in maintaining a defective heating plant in the barracks. The *Griggs* and *Jefferson* cases arose as malpractice actions by the plaintiff soldiers for alleged negligence on the part of Army surgeons at Army hospitals. In all three cases, it is obvious that the injuries and death were incident to and had occurred because of the servicemen's military service—Feres was in the barracks because he was in the service; Griggs and Jefferson were operated on by Army doctors on Army operating tables in an Army hospital because they were in the military service.

Similarly, in the instant case, as the findings of both lower courts make clear, the serviceman, at the time of his death, was in a military plane and under military discipline (R. 60, Pet. App. 4). The negligence asserted to have resulted in his death was not that of civilians (as in *Brooks* and *Brown*) but was that of other military personnel (as in *Feres*) in the operation and maintenance of the military aircraft (R. 4). Obviously, it was only because Herman Archer was a member of the armed forces employed by the military establishment that he was traveling in a military plane and was under military discipline. Since the military transportation was furnished to him only because of his status as a serviceman and since

the means of transportation were controlled by the military establishment and operated by other members of that establishment, his death necessarily arose out of or in the course of his military employment and as an incident to his service.

No different conclusion is warranted because Herman Archer was on leave status while returning to his post of duty on the military plane. The leave status, as the court below noted, is immaterial because, at the time of his death, the serviceman was "riding under military discipline on an army plane under control of a superior officer" (Pet. App. 4). This Court's holdings that service-incident claims are excluded from the Act did not turn on the formal leave or non-leave status of the serviceman. To the contrary, the holdings rested on considerations of the "special relationship of the soldier to his superiors" and to the Government, of "the effects of the maintenance of such suits on [military] discipline" and of the "sharp break in tradition" if a soldier were allowed to recover for the negligence of another soldier. *United States* v. *Brown,* 348 U. S. 110, 112; *Feres* v. *United States,* 340 U. S. 135, 141. Relying on these identical considerations, fully applicable to the service-incident claim here involved, we submit that both courts below correctly excluded it from the Act and remitted the claimants to their administrative compensation remedy.

2. This compensation remedy shows that, as in *Feres,* petitioners are not left financially unpro-

tected, even though service-incident claims are not cognizable under the Tort Claims Act. The record shows that the United States is, under other statutes and regulations, compensating petitioners for their loss and that they are receiving the full benefits and payments under the appropriate military and veterans' benefit laws (R. 20–23; 60–61). It is estimated that on the basis of petitioners' life expectancies, the total monthly compensation now being paid to them by the Veterans' Administration will aggregate more than $21,700. Furthermore, petitioners are also receiving, as a result of the death of their son in service, servicemen's indemnity benefits of $92.90 per month under the Act of April 25, 1951, 65 Stat. 33, 38 U. S. C. 851, 38 C. F. R. 4. 312 (a) (1954 Cum. Supp.). These payments will continue for a ten-year period and will total $11,148. In addition to these various monthly payments, having a combined value of more than $32,800, petitioners have also received from the United States a death gratuity payment of $468.00 under the Act of December 17, 1919, as amended, 41 Stat. 367, 57 Stat. 599, 10 U. S. C. 903. Under these various administrative compensation statutes, petitioners, as the district court observed in this case, "have a full and adequate remedy for recovery of compensation for the death" of the serviceman without resort to the Federal Tort Claims Act (Pet. App. 11; R. 62).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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